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IN THE SUPREME COURT OF THE STATE OF IDAHO

TROY DWAYNE PAYNE,)	
)	No. 42858
Petitioner-Appellant,)	
)	Elmore Co. Case No.
vs.)	CV-2013-788
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	

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BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ELMORE

HONORABLE LYNN G. NORTON
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

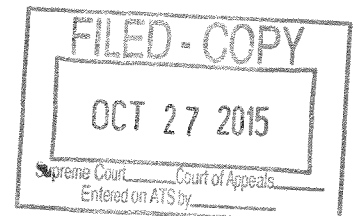
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COPY

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case.....	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE.....	3
ARGUMENT	4
Payne Has Failed To Show Error In The District Court's Order Summarily Dismissing His Petition For Post-Conviction Relief	4
A. Introduction	4
B. Standard of Review	4
C. The District Court Correctly Dismissed Payne's Post-Conviction Petition	5
CONCLUSION.....	10
CERTIFICATE OF MAILING	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aragon v. State</u> , 114 Idaho 758, 760 P.2d 1174 (1988)	6
<u>Baldwin v. State</u> , 145 Idaho 148, 177 P.3d 362 (2008)	6, 7
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001)	6
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 57 P.3d 787 (2002).....	4
<u>Goodwin v. State</u> , 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002)	5
<u>Monahan v. State</u> , 145 Idaho 872, 187 P.3d 1247 (Ct. App. 2008)	5
<u>Piro v. State</u> , 146 Idaho 86, 90 P.3d 905 (Ct. App. 2008).....	8
<u>Pizzuto v. State</u> , 146 Idaho 720, 202 P.3d 642 (2008)	5
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000)	5
<u>Schoger v. State</u> , 148 Idaho 622, 226 P.3d 1269 (2010).....	8
<u>State v. Bearshield</u> , 104 Idaho 676, 662 P.2d 548 (1983)	5
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003).....	5, 6
<u>State v. Payne</u> , 146 Idaho 548, 561, 199 P.3d 123, 136 (2008)	5
<u>State v. Payne</u> , Docket No. 38918, 2012 Unpublished Op. No. 573 (Idaho App., August 2, 2012)	1
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	6, 8
<u>Stuart v. State</u> , 118 Idaho 865, 801 P.2d 1216 (1990)	6
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007).....	4, 5, 6
 <u>STATUTES</u>	
I.C. § 19-4901	5
I.C. § 19-4903	5
I.C. § 19-4906	5, 6

RULES

I.R.E. 606(b)	9
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STATEMENT OF THE CASE

Nature Of The Case

Troy Dwayne Payne appeals from the district court's order dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In its decision on Payne's underlying criminal case, State v. Payne, Docket No. 38918, 2012 Unpublished Op. No. 573 (Idaho App., August 2, 2012), the Court of Appeals offered the following factual background for this case:

On April 6, 2009, without any prior notice, Payne went to the home of a law enforcement officer and handed the officer a small container filled with methamphetamine. According to Payne's subsequent trial testimony, the officer agreed to allow him to turn in the methamphetamine "without repercussions" and "with no strings attached." However, the officer testified that he told Payne only that the officer would not pursue charges if Payne entered drug rehabilitation treatment and provided information to the police, presumably regarding the source of the drugs. Payne refused to cooperate with the police, however, and was eventually charged with possession of a controlled substance, I.C. § 37-2732(c)(1), for possessing the methamphetamine that he gave to the officer.

Shortly after the jury was empaneled, the State notified the court that it anticipated that Payne would testify regarding his motive for possessing methamphetamine, and the State orally moved to preclude such testimony on grounds of irrelevance. Defense counsel confirmed that Payne planned to present a defense that he did not intend to possess the methamphetamine. Defense counsel said that Payne would testify about his motive and intent in order to demonstrate that he possessed the methamphetamine for the sole purpose of delivering it to the police. The district court repeatedly declined to rule on the State's motion regarding the admissibility of such testimony, preferring to wait until Payne testified. Payne ultimately was allowed to testify that an acquaintance tossed the container into his car, and that in an effort to "do the right thing" he took it to the police as soon as he realized that it contained drugs. The jury returned a guilty verdict and Payne appeal[ed], contending that the district

court erroneously prevented him from presenting a defense that he lacked the requisite intent for the offense.

Id., pp.1-2. The Court of Appeals upheld Payne's conviction finding that he was, in fact, able to present his proffered defense. Id., pp.6-7.

On August 22, 2013, Payne filed a timely petition for post-conviction relief, in which he alleged that his trial attorney had been ineffective for failing to (1) raise affirmative defenses of (a) innocent and/or temporary possession or (b) misfortune and (2) request jury instructions on those defenses; or in the alternative that appellate counsel had been ineffective for failing to argue that the jury should have been instructed on innocent and/or temporary possession. (R., pp.4-14.) Payne also included an affidavit from one of the jurors from his trial. (R., pp.16-18.) The state moved to strike the affidavit as inadmissible evidence under Idaho Rule of Evidence 606(b). (R., pp.147-48.) Payne objected to the motion but conceded that "enumerated statements 3, 7, and 8 are inadmissible" under Rule 606(b). (R., pp.150-53.)

The state then filed a motion for summary dismissal arguing that (1) Payne had failed to raise a material issue of fact showing that his attorney was ineffective for failing to raise an affirmative defense that had not been recognized in Idaho; (2) appellate counsel also was not ineffective for failing to present the unrecognized defense; and (3) Payne had failed to raise a material issue of fact showing that his counsel was ineffective for failing to raise the affirmative defense of "misfortune" because it did not apply to drug possession and Payne was not prejudiced regardless. (R., pp.164-76, 196-204.) The district court granted the state's motion for summary dismissal. (R., pp.205-14.) Payne filed a timely notice of appeal. (R., pp.216-18.)

ISSUE

Payne's statement of the issues on appeal is found at page 8 of his Appellant's brief and is lengthy. The state rephrases the issue as:

Has Payne failed to show error in the district court's summary dismissal of his petition for post-conviction relief?

ARGUMENT

Payne Has Failed To Show Error In The District Court's Order Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

In his post-conviction petition, Payne asserted that he was entitled to relief because, he claimed, his attorney rendered ineffective assistance by (1) failing to “present the affirmative defense of ‘innocent possession’ or ‘temporary possession’” and request a jury instruction on the same; and (2) “failing to raise and request jury instructions for the affirmative defense of ‘misfortune or accident’ pursuant to I.C. § 18-201(3).” (R., pp.6-8.) Payne also claimed that his appellate counsel was ineffective. (R., p.8.) The district court summarily dismissed Payne’s petition. (R., pp.205-12.) On appeal, Payne argues that the district court erred by dismissing his post-conviction claims of ineffective assistance of trial counsel. (Appellant’s brief, pp.9-17.) However, application of the correct legal standards to the facts of this case shows that summary dismissal was appropriate.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Correctly Dismissed Payne's Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief on the trial court's own initiative or in response to a party's motion. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a

claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

Where the petitioner alleges entitlement to relief based on ineffective assistance of counsel, he must show that his attorney’s performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To establish deficient performance, the petitioner must overcome the strong presumption that counsel’s performance was adequate and “show that his attorney’s conduct fell below an objective standard of reasonableness.” Baldwin v. State, 145 Idaho 148, 154, 177 P.3d 362, 368 (2008) (citations omitted). “[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective

evaluation.” Id. To establish prejudice, the petitioner must show “a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id.

Articulating and applying relevant legal standards, the district court addressed and properly dismissed Payne’s ineffective assistance of counsel claims because he failed to present admissible evidence establishing a *prima facie* case supporting them. (R., pp.205-12.) Payne failed to present sufficient evidence to make a *prima facie* case of deficient performance regarding his attorney not presenting the defense or requesting an instruction on innocent possession, which has never been recognized in Idaho. (R., pp.210-11.) Payne failed to present sufficient evidence to make a *prima facie* case of either deficient performance or prejudice in his attorney’s not presenting the defense of misfortune or accident. (R., pp.211-12.)

On appeal, Payne represents that the district court dismissed his claims of ineffective assistance of counsel on the basis that “the propriety of jury instructions is not ordinarily a matter that can be asserted in post-conviction.” (Appellant’s brief, pp.10-11, 16.) Payne appears to misunderstand the district court’s order. The issue was whether Payne had presented evidence showing that his defense counsel’s performance fell below an objective standard, an issue the district court squarely decided. (See R., pp.210-12.) Payne wanted the court to presume deficient performance based only on defense counsel not requesting certain jury instructions. (Id.) The district court would not presume deficient performance, especially where the propriety of the jury instructions needed to be raised on direct appeal. (Id.) Reviewing

the Court of Appeals' decision, the district court could not find that either proposed jury instruction should have been given. (Id.)

Defense counsel's alleged failure to present the affirmative defense of "innocent possession" or to request a jury instruction on the same cannot raise even a *prima facie* case of objectively deficient performance because that affirmative defense has never been recognized in Idaho. "Although the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland, the failure to advance a novel theory will not." Piro v. State, 146 Idaho 86, 91, 190 P.3d 905, 910 (Ct. App. 2008); see also Schoger v. State, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010). Having failed to show that defense counsel was deficient for failing to present a novel defense, Payne failed to make a *prima facie* showing of ineffective assistance of counsel on this claim.

Though the defense of misfortune or accident is an "established legal theory" in Idaho, that alone is insufficient to show ineffective assistance of counsel. Even assuming, *arguendo*, that the defense of misfortune would apply to the facts of Payne's criminal proceeding below and defense counsel should have requested a jury instruction on that defense, Payne still failed to present a *prima facie* case of ineffective assistance of counsel because he failed to present any admissible evidence of prejudice. On appeal, Payne relies on an affidavit submitted by one of the jurors from his trial, Ms. Junger; specifically her statement that she may have voted to acquit Payne had there been an affirmative defense instruction. (See Appellant's brief, pp.14-17.) But this statement was inadmissible.

Idaho Rule of Evidence 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes*, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

I.R.E. 606(b) (emphasis added). Payne conceded below that “enumerated statements 3, 7, and 8,” the only statements with any relevance to Payne’s prejudice argument on appeal, were “inadmissible because they address matters and statements made *during* the course of juror deliberations.” (R., pp.151-52 (emphasis original).) If the district court considered any of those statements from the Junger affidavit, it did so erroneously under Rule 606(b). Were this Court to consider any of those inadmissible statements on appeal, it would also do so in error.

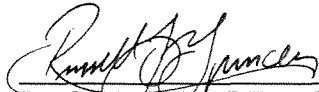
In the absence of the concededly inadmissible statements from the Junger affidavit, Payne has failed to present evidence raising even a *prima facie* case that he was prejudiced by defense counsel’s failure to request an instruction on misfortune. Having failed to present admissible evidence of prejudice, Payne failed to make a *prima facie* showing of ineffective assistance of counsel on this claim.

Because Payne failed to make a *prima facie* showing of ineffective assistance of counsel on either theory, the district court correctly dismissed his petition for post-conviction relief. The district court’s order should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Payne's petition for post-conviction relief.

DATED this 27th day of October, 2015.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 27th day of October, 2015, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

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RJS/dd